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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
8

9 Labor Smart, Inc.,

10 Plaintiff,

11 v.

12 Jason Tucker, *et al.*,

13 Defendants.  
14

No. CV-22-00357-PHX-JJT

**ORDER**

15 At issue is Defendants Jason and Melissa Tucker's Motion to Dismiss (Partial)  
16 (Doc. 134), to which Plaintiff Labor Smart, Inc. ("LTNC") filed a Response (Doc. 138),  
17 and Defendants filed a Reply (Doc. 139). The Court has reviewed the parties' briefs and  
18 finds this matter appropriate for decision without oral argument, neither party having  
19 requested it in any event. *See* LRCiv 7.2(f). For the reasons set forth below, the Court grants  
20 Defendants' Motion and dismisses Claim I of the Amended Complaint (Doc. 67) with  
21 prejudice.

22 **I. BACKGROUND**

23 For a case at the motion-to-dismiss stage, this one has a remarkably convoluted  
24 history. Here the Court will only briefly summarize the background of the case as relevant  
25 to the instant Motion. For a more fulsome summary, the Court refers the reader to its prior  
26 Orders, including the background section of its May 1, 2023 Order resolving the Joint  
27 Motion to Realign the Parties, Dismiss Parties, Amend the Third-Party Complaint, and  
28 Amend the Case Caption filed by LTNC and various former parties. (Doc. 129.)

1 Takeover Industries, Inc. (“Takeover”) initiated this lawsuit in March 2022,  
2 asserting claims against Michael Holley and his wife, Chirene. (Doc. 1.<sup>1</sup>) In May 2022,  
3 Mr. Holley filed an Answer to Takeover’s claims, along with counterclaims against  
4 Takeover and a Third-Party Complaint asserting claims “individually and derivatively on  
5 behalf of LTNC” against Jason and Melissa Tucker,<sup>2</sup> Toby McBride, and Joseph Pavlik.  
6 (Doc. 38.) LTNC is a publicly traded company originally formed under Nevada law and of  
7 which Takeover is a wholly owned subsidiary. The Tuckers filed a Motion to Dismiss the  
8 derivative third-party claims against them. (Doc. 60.) “[I]n abundance of caution,” they  
9 also filed an Answer to the Third-Party Complaint. (*See* Doc. 58 at 6 n.2.) Mr. Holley  
10 subsequently amended the Third-Party Complaint. (Doc. 67.) The Tuckers then filed a  
11 Motion to Dismiss the amended Third-Party Complaint. (Doc. 75.) They did not, as they  
12 had with the original Third-Party Complaint, file an Answer to the amended Third-Party  
13 Complaint.

14 In February 2023, the claims and counterclaims among Takeover and the Holleys  
15 were dismissed with prejudice pursuant to a Stipulation by the parties. (Doc. 120.)  
16 Mr. Holley then voluntarily dismissed one of his third-party claims without prejudice as to  
17 all of the third-party defendants (Doc. 124) and moved to dismiss without prejudice each  
18 of his claims as against Messrs. Pavlik and McBride, which request the Court granted.  
19 (Doc. 129.) LTNC simultaneously moved to substitute in as Plaintiff in place of Mr. Holley  
20 in prosecuting the claims asserted against the Tuckers in the amended Third-Party  
21 Complaint, which were by then the only remaining claims in the case. (Doc. 124.) The  
22 Court granted this substitution and, for the sake of simplicity, directed that the amended  
23 Third-Party Complaint be referred to as the operative Amended Complaint going forward.  
24 In light of LTNC’s substitution in Mr. Holley’s place, the Court denied as moot the  
25 Tuckers’ Motion to Dismiss and directed the Tuckers to file an Answer to the Amended  
26 Complaint.

27 \_\_\_\_\_  
28 <sup>1</sup> Ms. Holley was named in her capacity as part of the Holley marital community.

<sup>2</sup> Like Ms. Holley, Ms. Tucker was named as part of the Tucker marital community.

1 In lieu of answering, the Tuckers filed the instant Motion to Dismiss. They seek  
 2 dismissal under Federal Rule of Civil Procedure 12(b)(6) of the first of the three remaining  
 3 claims against them, to which the Court will refer as Claim I of the Amended Complaint.  
 4 In this claim, LTNC alleges Jason Tucker<sup>3</sup> took various actions in breach of his fiduciary  
 5 duties to LTNC. (Doc. 67 at 25–27.)

## 6 **II. LEGAL STANDARD**

7 Rule 12(b)(6) is designed to “test[] the legal sufficiency of a claim.” *Navarro v.*  
 8 *Block*, 250 F.3d 729, 732 (9th Cir. 2001). A dismissal under Rule 12(b)(6) for failure to  
 9 state a claim can be based on either: (1) the lack of a cognizable legal theory; or (2) the  
 10 absence of sufficient factual allegations to support a cognizable legal theory. *Balistreri v.*  
 11 *Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). When analyzing a complaint for  
 12 failure to state a claim, the well-pled factual allegations are taken as true and construed in  
 13 the light most favorable to the nonmoving party. *Cousins v. Lockyer*, 568 F.3d 1063, 1067  
 14 (9th Cir. 2009). A plaintiff must allege “enough facts to state a claim to relief that is  
 15 plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has  
 16 facial plausibility when the plaintiff pleads factual content that allows the court to draw the  
 17 reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v.*  
 18 *Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). “The plausibility  
 19 standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer  
 20 possibility that a defendant has acted unlawfully.” *Id.*

21 “While a complaint attacked by a Rule 12(b)(6) motion does not need detailed  
 22 factual allegations, a plaintiff’s obligation to provide the grounds of his entitlement to relief  
 23 requires more than labels and conclusions, and a formulaic recitation of the elements of a  
 24 cause of action will not do.” *Twombly*, 550 U.S. at 555 (cleaned up and citations omitted).  
 25 Legal conclusions couched as factual allegations are not entitled to the assumption of truth  
 26 and therefore are insufficient to defeat a motion to dismiss for failure to state a claim. *Iqbal*,  
 27 556 U.S. at 679-80. However, “a well-pleaded complaint may proceed even if it strikes a

28 <sup>3</sup> The Court will refer only to Jason Tucker, as Melissa Tucker was not involved in any of  
 the actions alleged by LTNC.

1 savvy judge that actual proof of those facts is improbable, and that ‘recovery is very remote  
2 and unlikely.’” *Twombly*, 550 U.S. at 556 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236  
3 (1974)).

### 4 **III. ANALYSIS**

#### 5 **A. Timeliness**

6 The first issue is timeliness. The Tuckers filed their Motion under Rule 12(b)(6),  
7 arguing that Claim I fails to state a claim upon which relief can be granted. The Motion  
8 responds to the Amended Complaint being prosecuted by LTNC. (Doc. 67.) LTNC argues  
9 the Motion is untimely because the Tuckers previously filed an Answer. (Doc. 58.) But, as  
10 the Tuckers note, they filed their Answer out of an “abundance of caution” and  
11 simultaneously with a prior Rule 12(b) motion. The Tuckers’ Answer is no longer operative  
12 because it responded to a complaint that was subsequently amended, which the Tuckers  
13 have not since answered. Instead, they filed a Motion to Dismiss the Amended Complaint  
14 (Doc. 75), which was denied as moot upon LTNC’s substitution as the plaintiff. Thus, there  
15 are really two potential timeliness issues: first, the propriety of filing a post-Answer Rule  
16 12(b)(6) motion and second, the propriety of filing a successive Rule 12(b) motion.

17 These issues are immaterial. The Court has discretion to treat an untimely Rule  
18 12(b)(6) motion as a motion under Rule 12(c). *See Aldabe v. Aldabe*, 616 F.2d 1089, 1093  
19 (9th Cir. 1980); *In re Apple iPhone Antitrust Litig.*, 846 F.3d 313, 317–19 (9th Cir. 2017).  
20 A Rule 12(c) motion is considered “functionally identical” to a Rule 12(b)(6) motion and  
21 the same standard of review applies to motions under either rule. *Gregg v. Hawaii, Dep’t*  
22 *of Pub. Safety*, 870 F.3d 883, 887 (9th Cir. 2017).

23 The Court may exercise such discretion with a possibly untimely motion when it  
24 does not appear to have been filed for any “strategically abusive purpose.” *In re Apple*, 846  
25 F.3d at 320. The Tuckers’ current Motion to Dismiss was filed following the dismissal of  
26 their first Motion to Dismiss as moot. (Doc. 129.) The Tuckers do not appear to be acting  
27 with a strategically abusive purpose because the second Motion to Dismiss followed a  
28 dramatic realignment of the parties. As a result of this realignment, the merits of the first

1 Motion to Dismiss were not reached. Additionally, by reaching a decision on the merits of  
 2 the Tuckers' Motion, the Court will materially expedite the disposition of this already  
 3 lengthy litigation, which will benefit both parties. *See In re Apple*, 846 F.3d at 320. The  
 4 Court will elect to exercise its discretion and consider the merits of the motion.

### 5 **B. Governing Law**

6 LTNC raises its claims for breach of fiduciary duty under Wyoming law, or in the  
 7 alternative Nevada law. (Doc. 67 at 25–29.) Indeed, it has been disputed in this litigation  
 8 whether LTNC remains a Nevada corporation or whether it is a Wyoming corporation. Yet  
 9 the parties do not discuss this issue or provide citations to any Nevada or Wyoming caselaw  
 10 in their briefing on the instant Motion. In any event, the Court need not resolve the question  
 11 at this juncture because under Wyoming law or Nevada law, a claim for breach of fiduciary  
 12 duty requires the same elements: (1) existence of a fiduciary duty, (2) breach of the duty,  
 13 and (3) damages that result from the breach. *Guzman v. Johnson*, 438 P.3d 531, 538 (Nev.  
 14 2021); *In re J. Kent Kinniburgh Revocable Tr. Dated Jan. 27, 1992, as Amended and*  
 15 *Restated*, 530 P.3d 579, 587 (Wyo. 2023). As courts in both jurisdictions treat these  
 16 elements in a similar manner, the choice of law is not dispositive as to the resolution of this  
 17 Motion.

18 Under Nevada law, directors and officers owe fiduciary duties of care and loyalty  
 19 to the corporation. *Chur v. Eighth Jud. Dist. Ct. in and for Cnty. of Clark*, 458 P.3d 336,  
 20 340 (Nev. 2020). The duty of loyalty requires the board and its directors to maintain, in  
 21 good faith, the corporation's and its shareholders' best interests over anyone else's  
 22 interests. *In re Amerco Derivative Litig.*, 252 P.3d 681, 700–01, (Nev. 2011). A breach of  
 23 fiduciary duty gives rise to liability for damages resulting from the breach. *Stalk v.*  
 24 *Mushkin*, 199 P.3d 838, 843 (Nev. 2009). Suffering damages requires plaintiffs to be  
 25 measurably worse off as a result of the defendant's actions. *See Brown v. Kinross Gold*  
 26 *U.S.A., Inc.*, 531 F. Supp. 2d 1234, 1248 (D. Nev. 2008) (applying Nevada law).

27 Similarly, under Wyoming law, corporate officers have a fundamental duty of  
 28 loyalty and fiduciary duty to their corporation. *Squaw Mountain Cattle Co. v. Bowen*, 804

1 P.2d 1292, 1296 (Wyo. 1991). Corporate directors have a duty to manage the affairs of the  
 2 corporation in the best interests of the corporation and its shareholders. *Orthopaedics of*  
 3 *Jackson Hole, P.C. v. Ford*, 250 P.3d 1092, 1104 (Wyo. 2011). Breach can occur when a  
 4 party does not act in good faith or with fair dealings. *Gowdy v. Cook*, 455 P.3d 1201, 1208  
 5 (Wyo. 2020). Partial and imprudent decision making can be evidence of a breach of duty.  
 6 *See Acorn v. Moncecchi*, 386 P.3d 739, 756 (Wyo. 2016). Like Nevada law, Wyoming law  
 7 requires a measurable degree of damages resulting from the breach. *See Gowdy*, 455 P.3d  
 8 at 1209. A plaintiff can be held liable for damages that resulted from the plaintiff's actions.  
 9 *See Aimone v. Aimone*, 529 P.3d 35, 45 (Wyo. 2023).

10 As Nevada and Wyoming treat the elements of breach of fiduciary duty in a similar  
 11 manner, the Court will conduct its analysis of the issue without further reference to the  
 12 different state laws under which the claim arose.

### 13 **C. Breach of Fiduciary Duty**

14 Even assuming LTNC has plausibly alleged the first two elements of its claim —  
 15 that Mr. Tucker breached fiduciary duties owed to LTNC — the Court finds LTNC has not  
 16 plausibly alleged the third element of damages. The plausibility of a claim derives from its  
 17 well-pleaded factual allegations. *See Iqbal*, 566 U.S. at 664. LTNC has not alleged facts  
 18 necessary to support a plausible finding of damages for Claim I.

19 LTNC first alleges that Mr. Tucker breached his fiduciary duty to it by taking  
 20 actions to remove Mr. Holley from the LTNC board of directors without properly  
 21 convening a meeting of the board as required by Nevada and Wyoming law. However, the  
 22 Amended Complaint fails to allege LTNC suffered any measurable damages as a result of  
 23 the alleged impropriety of Mr. Holley's removal beyond a vague reference to the  
 24 expenditure of "corporate resources" on "unauthorized activities" — which circularly  
 25 include the very act of removing Mr. Holley (who has since been reinstated) and an alleged  
 26 transfer of Mr. Holley's shares (which, LTNC now implicitly concedes, he never actually  
 27 lost). (*See* Doc. 138 at 5–6.) LTNC essentially asks the Court to speculate as to the harm  
 28 that resulted from failing to follow proper board meeting procedures, but its allegation

1 “lacks the factual specificity required to raise a right to relief above the speculative level.”  
2 *Rick-Mik Enters., Inc. v. Equilon Enters. LLC*, 532 F.3d 963, 973 (9th Cir. 2008) (quoting  
3 *Twombly*, 550 U.S. at 555). LTNC’s claim that it was harmed through Mr. Tucker’s  
4 improper convening of a board meeting fails to meet the plausibility standard.

5 LTNC next claims that Mr. Tucker breached his fiduciary duty by causing the  
6 company “to loose [sic] the benefit of Holley’s decades of management experience in the  
7 beverage industry based on false pretenses.” (Doc. 67 at 26.) This claim also fails to present  
8 a plausible allegation of measurable damages. LTNC again asks the Court to speculate as  
9 to what damages resulted from Mr. Holley’s removal from the board of directors—to  
10 speculate about the concrete value of his “decades of management experience.” However,  
11 the plausibility standard asks for “more than a sheer possibility” of harm. *See Iqbal*, 556  
12 U.S. at 678. LTNC has done no more than ask the Court to accept the possibility the  
13 company was harmed by the loss of Mr. Holley’s experience. It has provided no factual  
14 allegations that make this claim plausible rather than speculative. LTNC’s claim that it was  
15 harmed by Mr. Holley’s removal does not meet the plausibility standard.

16 LTNC’s next claim is that Mr. Tucker removed Mr. Holley from the LTNC board  
17 “for the express purpose of obtaining his Series A Preferred Shares for [his] personal  
18 benefit.” (Doc. 67 at 26.) However, LTNC never specifically alleges that Mr. Holley’s  
19 Series A shares were actually taken from him. As noted, LTNC now implicitly concedes  
20 that a transfer of Mr. Holley’s shares never in fact took place. (*See* Doc. 138 at 6.) LTNC  
21 has no plausible claim for damages when Mr. Holley has retained ownership of the shares.  
22 Nor does the Court understand, even if Mr. Tucker had taken Mr. Holley’s shares, how that  
23 would result in harm to LTNC — the party Mr. Holley successfully sought to substitute in  
24 for him as operative Plaintiff.

25 LTNC’s penultimate claim is that Mr. Tucker breached his fiduciary duty “by failing  
26 to pay LTNC’s taxes to the State of Wyoming . . . which caused the State of Wyoming to  
27 take administrative action against LTNC.” (Doc. 67 at 27.) The Court finds this claim again  
28 presents a conclusory allegation without a plausible claim for damages. LTNC states that



1 such information is “reflected in the public records.” (Doc. 67 at 27.) However, as pointed  
 2 out by the Tuckers, the Wyoming Secretary of State indicates that LTNC went into tax  
 3 delinquency on January 2, 2021. (Doc. 134-1 at 3.) LTNC in its Amended Complaint  
 4 alleges that Mr. Tucker was not appointed to the board of directors until September 13,  
 5 2021. (Doc. 67 at 21.) A court may consider “documents incorporated by reference in the  
 6 complaint.” *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). LTNC’s Amended  
 7 Complaint incorporates and references the documents of the Secretary of State of  
 8 Wyoming as part of the public record. Based on reference to those documents, and LTNC’s  
 9 allegation that Mr. Tucker was not appointed to its board until September 2021, it is simply  
 10 not plausible that Mr. Tucker is liable for LTNC’s failure to pay taxes in Wyoming when  
 11 he was not part of the company when it went into tax delinquency. Tellingly, LTNC  
 12 provides no meaningful defense of this claim in its Response. (*See* Doc. 138 at 7.)

13 Finally, LTNC argues that Mr. Tucker conducted all these actions for his “personal  
 14 benefit.” (Doc. 67 at 27.) However, the issue of damages looks at the impact of the actions  
 15 on the allegedly injured party. Here, whether or not Mr. Tucker was made better off by his  
 16 actions, LTNC still must allege specific factual allegations that show the company has been  
 17 harmed by those same actions. LTNC has failed to present a plausible claim that Mr.  
 18 Tucker is responsible for damages to LTNC. Therefore, the Court will dismiss Claim I of  
 19 the Amended Complaint for failing to state a claim.

#### 20 **D. Leave to Amend**

21 “[D]istrict courts are only required to grant leave to amend if a complaint can  
 22 possibly be saved.” *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000). The Court thus  
 23 need not grant leave to amend if it determines that the pleading cannot be cured by the  
 24 allegation of other facts. *See id.* at 1127.

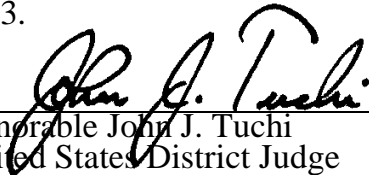
25 The Court will not grant leave to amend in this case. It must be able to conceive of  
 26 additional facts plausibly demonstrating damages that would support LTNC’s claims of  
 27 breach of fiduciary duty against Mr. Tucker. *See United States v. Corinthian Colls.*,  
 28



1 655 F.3d 984, 995 (9th Cir. 2011). It cannot do so here. As Claim I cannot be saved by the  
2 allegation of additional facts, the Court will not grant LTNC leave to amend.

3 **IT IS THEREFORE ORDERED** granting Defendants Jason and Melissa Tucker's  
4 Motion to Dismiss (Doc. 134). Claim I of Plaintiff Labor Smart, Inc.'s Amended Complaint  
5 (Doc. 67) is dismissed with prejudice.

6 Dated this 6th day of October, 2023.

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9 Honorable John J. Tuchi  
10 United States District Judge  
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